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Judging and Diversity: Justice or just us?

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JUDGING AND DIVERSITY: JUSTICE OR JUST US?

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I INTRODUCTION

Let me begin by making a few candid remarks. I am both honoured and somewhat nervous to present this paper. I am honoured in that some of my more recent work[1] has generated sufficient interest that the organizers of this conference thought it appropriate for me to address the issue of inclusion. I am nervous because the topics that are to be dealt with are some of the most difficult that Canada as a society and we, as members of the legal community, need to confront. Specifically, I am apprehensive because issues of racialized diversity are frequently highly charged and emotional and can often deteriorate into debates that are premised upon misunderstandings and defensiveness. Moreover, I am concerned that my thoughts may be misinterpreted. As a white male university professor with tenure I hardly qualify as an "outsider", as one who is excluded. Thus I should not be misunderstood as speaking on behalf of those who are at the margins of Canadian society. Indeed my focus is not so much on the experiences of those who have been historically excluded, but rather on the options that are available to those of us who are "insiders". Furthermore, I am not a judge and have little or no familiarity with what Lord Justice Brooke described as "the culture of judging".[2] However, as a member of the university community I have some experience in judging (in terms of admissions, examinations etc.) and issues of cultural diversity have generated a lot of debate in the universities for quite a while.[3]

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[1] R. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R.* v. *R.D.S.*" (1995) 18 Dal. L.J. 408.

[2] Mr. Justice Henry Brooke, "The Administration of Justice in Multicultural Societies" unpublished manuscript, May 21st, 1996, (on file with author).

[3] See e.g. R. Devlin and A.W. MacKay, "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1991) 14 Dal. L.J. 295; R. Devlin, "Towards Another Legal Education: Some Tentative and Speculative Proposals" (1989) 38 U.N.B.L.J. 89; C. Aylward, "Adding Colour -

A Critique of: An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1995) 8 C.J.W.L. 470.

However, despite my reservations, I plan to forge ahead and to address my topic: "Judging and Diversity", which I have unimaginatively subtitled "Justice or Just Us?".

It is clear that the inevitable is upon us: as a society Canada is undergoing significant social change and law, as a social institution and mode of social interaction and regulation, cannot be immune to such changes. I want to suggest to you that these transitions are more than statistical - they are cultural and in that sense they will generate significant changes, indeed challenges, to our conventional ways of doing things. Change is of course somewhat unnerving, even disturbing or threatening, but I want to ask what sort of responses are available to us as we attempt to continue our commitment to the promotion of justice in Canadian society. Can we begin to imagine judicial perspectives and techniques that are forward looking and sensitive to cultural diversity - a pluralistic justice - or should we stick with a conception of justice that reflects the perspectives of those of us who have traditionally occupied positions of legal responsibility and power - that is, justice as just us?[4]

In a few moments I will outline three different approaches to judging in a pluralist society which may serve as potential points of reference for discussions on the topic of "the court in an inclusive society". But before doing so I want to address an issue that is often foremost in the minds of some judges as they approach judicial education programmes: the threat that they might pose to judicial independence and impartiality.

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[4] See also D. Fraser, "The First Cut is (Not) The Deepest: Deconstructing `Female Genital Mutilation' and the Criminalization of the Other" (1995) 18 Dal.L.J. 310.

II DIVERSITY, INDEPENDENCE AND IMPARTIALITY.

As I mentioned in my introductory comments, profound cultural transitions inevitably generate challenges to our conventional ways of doing things. And change and challenge are destabilizing. It is therefore quite understandable that one response might be to fear that such changes could constitute an affront to the two fundamental principles of judicial office: independence and impartiality. Consequently, I think that it is appropriate to briefly consider the significance and purpose of these two principles.

Specifically, it might be helpful to focus on the relationship between independence and impartiality. While both principles in the abstract are frequently invoked, my experience has been that there tends to be an overemphasis on the former (independence) at the expense of the latter (impartiality). For example, in the last year there have been two quite important books published addressing the status of the judiciary in Canada: *Judicial Conduct and Accountability*[5] and *A Place Apart: Judicial Independence and Accountability in Canada*.[6] While both works are very helpful, to my mind one of their most serious limitations is that they take as their major premise the principle of judicial independence. In other words, both books tend to consider judicial independence to be an

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[5] Hon. Mr. Justice David Marshall, *Judicial Conduct and Accountability* (Toronto: Carswell, 1995).

[6] M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian

end in itself and this, in turn, renders all other principles such as impartiality and accountability second order.[7]

Communication Group, 1995).

[7] For a further discussion of both books, see R. Devlin, Book Review (1996) 75 Can. Bar Rev. 398.

While the importance of judicial independence cannot be gainsaid, I think that there is a danger in treating it as an end in itself. It seems to me that the primary goal that we should be aiming for is ethical, fair and responsible decisionmaking. In other words, I would suggest that impartiality is the end to be achieved and that independence is a means - a crucial means -to that end, but not an end in itself. Nor am I alone in making this suggestion. A similar point was made, if only in passing, by the Supreme Court in *R v. Lippé*.[8] I would argue that this reallocation of emphasis from independence to impartiality is important because it puts independence in context. It means that we cannot rely on judicial independence as some sort of conversation stopper. Rather, it is reconceived as a vital mechanism in our quest for fairness in decision-making. But it is only one of several vital components. Others might include competence, accountability and equality.

Once we reconfigure the equation to realize that independence is a variable and not a solution per se, we are in a position to more adequately pursue our primary goal of fairness in decisionmaking. Thus I would suggest that programmes which are designed to provide information about the challenges of cultural diversity to the judiciary should not be perceived as threats to judicial independence but rather as aids to the achievement of better informed decision-making. To the extent that they help us to understand how systemic inequality can insinuate itself into our everyday practices, such programmes serve as a necessary, if insufficient, prerequisite to the goal of impartiality.

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[8] [1991] 2 S.C.R. 114 at 139.

III THREE CONCEPTIONS OF IMPARTIALITY IN A PLURALISTIC SOCIETY

Having briefly addressed the issue of the relative importance of independence and impartiality, I now want to proceed to the heart of my presentation: an overview of three potential conceptions of impartiality in a pluralistic society.

Traditionally, we have tended to have a rather simplistic conception of impartiality: do nothing to indicate any favouritism or hostility to any of the parties in a court action. In reality, as many judges have candidly informed me, the picture is much more complicated. This is particularly the case when one encounters diversity in the courtroom. Furthermore, while judges have been struggling with issues of impartiality in the trenches, the issue of impartiality has been simultaneously the focus of extensive academic analysis over the last decade.[9] This indicates that impartiality is what philosophers describe as "an essentially contested concept"[10]: its meaning is "up for grabs".

Over the last year, I have spent a lot of time thinking about how we might address pluralism and impartiality. For the purpose of discussion I want to present you with three models of impartiality that might either reflect some of your own thoughts on the matter, or,

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[9] See e.g. B. Barry, *Justice as Impartiality* (New York: Clarendon Press, 1995).

[10] E. Gallie, "Essentially Contested Concepts" (1956) 77 Proceedings of the Aristotelian Soc. 167.

which you might wish to consider. These can be described as the classical, relational and situational conceptions of impartiality. To be clear, these models are heuristic devices: I am not claiming that anyone subscribes to any of these in a pure form or that they are mutually exclusive, but I do want to suggest that they may reflect different images of justice and impartiality. Moreover, to try to dramatize the differences I have attached an iconic representation of justice from the world of art to each of these models, in part because I believe that seeing and hearing are two quite distinct ways of thinking about a problem. However, I am no art critic. What is offered is simply my interpretation of these pieces for the purposes of this discussion.

A CLASSICAL CONCEPTION

This is perhaps the most familiar and comfortable conception of impartiality. The icon is, of course, Themis blindfolded. It is such a popular understanding of impartiality that I did not have to go very far to find a representation: it adorns the brochures of the library at the Faculty of Law at McGill where I am currently a visiting professor.

The idea is very straightforward: a judge is to divest himself/herself of all preconceptions and identifications. The role of a judge is simply to discover and apply the law. The classical conception is premised upon what one of Canada's leading philosophers, Charles Taylor, calls "the ideal of disengagement".[11] Reason, not emotion, will ensure fairness. Equality before the law is the mantra: thus everyone is to be treated the same regardless of their race, class or gender.

Specifically, when it comes to issues of race the classical ideal is that the judge should be colourblind.[12] The assumption is that each person is an individual and that racial identity (in the sense of skin colour) is presumptively irrelevant unless its particular relevance can be causally demonstrated in a particular case.[13] In short, objectivity is attained through withdrawal and disinterestedness.[14]

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[11] C. Taylor, *Philosophy and The Human Sciences: Philosophical Papers*, Volume II 5 (New York: Cambridge University Press, 1985).

[12] *Plessy v. Ferguson*, 163 U.S. 537 at 559 (1896), Harlan J., dissenting; over'd by *Brown v. Board of Education*, 347 U.S. 483 at 494 (1954).

[13] *McCleskey v. Kemp* 481 U.S. 279 (1987).

[14] M. Hoeflich & J. Deutrch, "Judicial Legitimacy and the Disinterested Judge" (1978) 6 Hofstra L. Rev. 769.

The classical approach has a long and distinguished pedigree. Icons of justice blindfolded go back at least as far as the middle ages.[15] Further, John Rawls, perhaps the greatest liberal thinker of the twentieth century, constructs his arguments on the basis that decisions about justice are best made behind a "veil of ignorance".[16]

But it has a couple of limitations.

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[15] R. Jacob, *Images de la Justice* (Paris: Le Léopard d'Or, 1994).

[16] J. Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1971).

First and most importantly, "the ideal of disengagement" is at odds with the inescapable reality that we are social beings, that we are inevitably saturated with relationships and preconceptions. Thus disengagement can only be bought at a price: usually at the risk of objectifying those with whom we have to deal. The problem with justice blindfolded is that it tends to conflate impartiality with the impersonal, a move that can result in a judge's humanity being subordinated to some bureaucratic role.[17] As the Canadian Judicial Council states in its *Commentaries on Judicial Conduct*:

> Impartiality is one thing, indifference is another. A judge may show alertness to the problems of our days without putting his impartiality into jeopardy.[18]

Second, the conventionalism of the classical approach renders it of dubious utility in a society such as Canada which is undergoing fundamental cultural change. There is an in-built-tendency within the classical model to believe that fair decision-making can only be achieved if there is solipsistic harmony with traditional ways of doing things. To the extent

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[17] See more generally, V. Havel, "Politics and Conscience" in J. Vladislav ed., *Vaclav Havel or Living in Truth* 136 (Boston: Faber and Faber, 1989).

[18] Canadian Judicial Council, *Commentaries on Judicial Conduct* 46 (Cowansville, Yvon Blair, 1991).

that the classical model accepts the myth of colourless individualism, it runs the risk of mistaking colourblindness for cultural neutrality.[19]

B RELATIONALIST CONCEPTION

A relationalist approach to impartiality goes to the other end of the spectrum. Whereas the classical approach advocates that the judge be as disengaged as possible from the parties before them, a relational approach suggests that a judge should incorporate a large degree of empathy into his or her tasks.

The relationalist approach puts a premium on contextualism. That is, relationalism recognizes that we all have inescapable social contexts that influence our life experiences, our conduct and our understandings of the world. Consequently, relationalists argue that we cannot ignore such social variables and that we should strive to be as fully conscious of these as possible so as to offset any taken for granted assumptions.

In the context of diversity, a relationalist approach would suggest that a judge should confront and come to terms with "racialization" (as opposed to racial identity or skin colour) that is, unequal and hierarchal social relations constructed on the basis of race. Consequently before judging, one should attempt to see the world from the perspective of the "other".

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[19] For a further discussion of these problems, see Devlin, *supra* note 1.

The iconic representation of justice which one advocate of relationalism[20] has chosen is a piece of African art entitled "The Lord of Jurisprudence".

[20] J. Resnick, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61 So. Cal. L. Rev. 1877.

Nail Figure, 1875/1900, Kongo. Photograph © 1996 The Detroit Institute of Arts, Founders Society Purchase, Eleanor Clay Ford Fund for African Art.

Nail Figure, 1875/1900, Kongo. Photograph © 1996 The Detroit Institute of Arts, Founders Society Purchase, Eleanor Clay Ford Fund for African Art.

At least two things are worth noting about this image: firstly, the judge here is not blindfolded, but rather the eyes are fully open to the events of the world; and secondly, this Lord of Jurisprudence is pierced with knives, which can be interpreted as the pain of attempting to internalize the perspectives and experiences of the other in the process of judging.

This relational approach is of much more recent vintage than the classical approach, but is strongly favoured by several high profile American law professors[21] and Professor Nedelsky at University of Toronto.[22] It has been given its most articulate philosophical articulation by Charles Taylor of McGill in an important essay entitled "Understanding and Ethnocentricity" when he calls for "a fusion of horizons".[23] Traces of it are also to be found in the work of Madame Justice Bertha Wilson when she argued, in a powerful metaphor, that a judge must

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[21] See, for example, M. Minow, *Making all The Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990); Resnick, *supra* note 20; K. Karst, "Judging and Belonging" (1988) 61 So. Cal. L. Rev. 1957.

[22] J. Nedelsky, "The Problem of Judgment" (forthcoming Queen's Quarterly).

[23] Taylor, *supra* note 11.

try to enter the skin of a litigant and to make his or her experience part of your experience, and only when you have done that, to judge.[24]

[24] "Will Women Judges Really Make A Difference?" (1990) 28 Osgoode Hall L.J. 507 at 521.

While intuitively attractive, I think that there are a couple of significant problems with this approach. First, I am a bit of a skeptic and I doubt our capacity as human beings to be able to adequately come to terms with the position of the other.[25] Secondly, I worry about the danger of appropriation. In the effort to empathize with the marginalized, those who have privilege may begin to speak on behalf of the excluded, usually mistranslating their experience and thereby reinforcing their silence. Thirdly, I wonder whether the burden of relationalism is too great, whether we are actually capable of taking on the context and pain of the other and still be able to do the job of judging.

Thus I want to suggest to you a third conception that lies somewhere in between the classical and relational models, although it draws heavily on relationalism's commitment to contextualism.

C SITUATIONAL CONCEPTION

In this model I want go immediately to the iconic representation and then try to tease out its key insights. It is, rather obviously, a complicated piece which warrants a telling of the story of its background.

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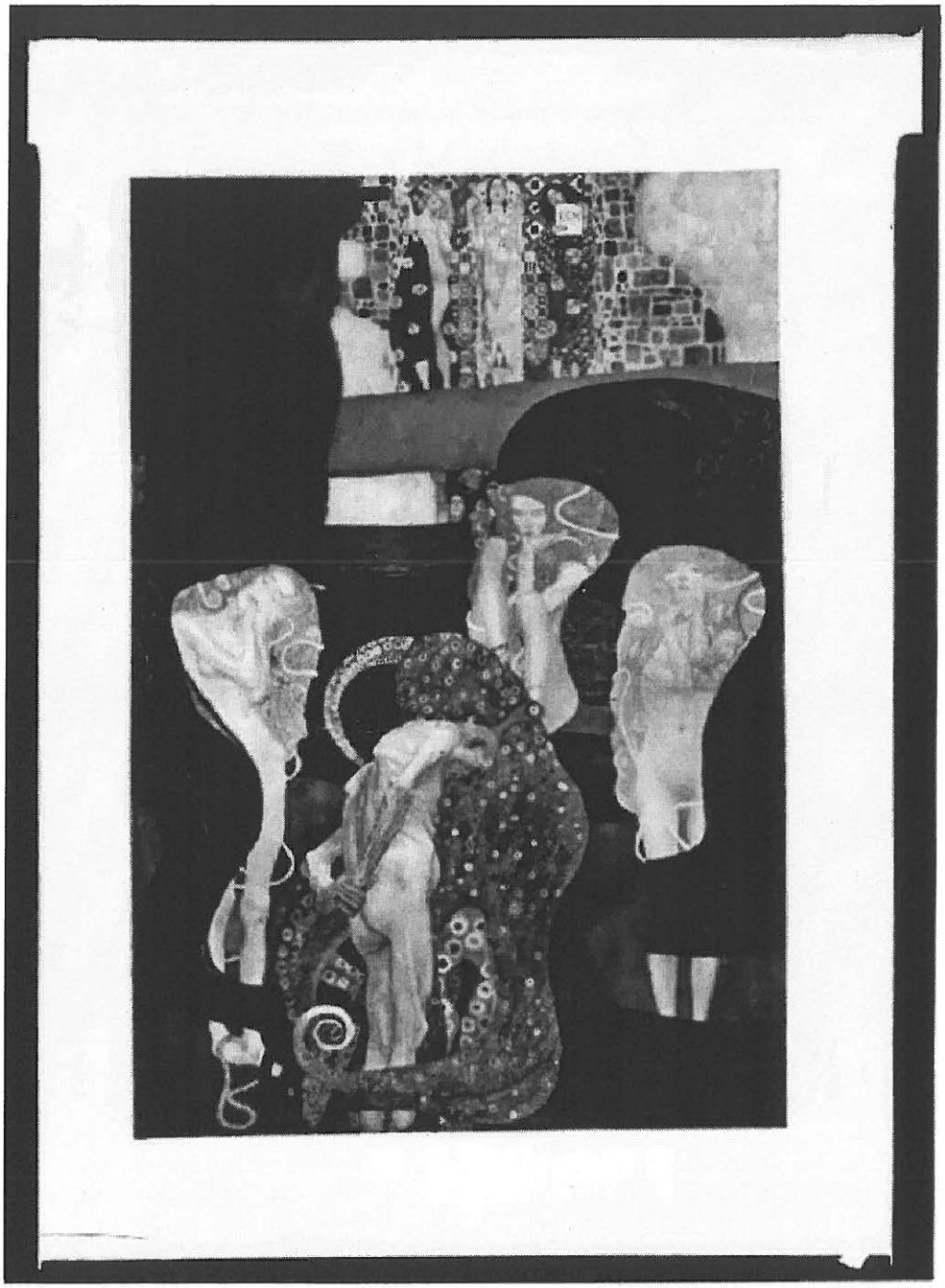
[25] For a further critique of Minow's work in this regard, see my "Demanding Difference (But Doubting Discourse)" (1994) 7 C.J.W.L. 156.



Jurisprudence, 1903, Gustav Klimt. Photograph © 1996 Verlag Galerie Welz.

The painter is Gustav Klimt, more famous for his piece "The Kiss" with which I am sure you are all familiar. This work is called "Jurisprudence". The painting was commissioned by the University of Vienna in 1897 as part of a series representing the various faculties: law, medicine, and philosophy. For our purposes it might be noted that

the university stipulated that the governing theme should be the "triumph of light over darkness". It was a large painting, measuring approximately three metres by four metres. It took Klimt several years to finish the series and when he did the university administration was not pleased because it did not comply with their vision. To their minds it was ugly, even hellish. There ensued an enormous controversy, but in the end Klimt agreed to buy back the works in 1907. Unfortunately, this piece was destroyed during the second world war. All that remains are some black and white reproductions, rather than the vivid gold and black of the original. (Hence the difficulty of obtaining a clear reproduction).

There are several points about this piece that provide us with an insight into what I call a situationalist approach to impartiality. Despite the fact that Klimt might be open to criticism as to his portrayal of women in this and other works, there are several aspects of the work that might be relevant to our inquiry:

First, unlike the first two representations, Justice (the figure at the top of the painting, in the middle) is not freestanding or isolated. She is very clearly part of the broader social context, although somewhat detached.

Second, Justice is not blindfolded, but apparently aware of this larger social context.

Third, Justice is flanked by law on the right and passion/emotion on the left; both therefore appear to have a role to play.

Fourth, as we move to the bottom of the page, Klimt gives us a very stark representation of the person who comes before the law: naked, emaciated and haunched. Law, while having aspirations for justice, can also have a very negative impact.

Fifth, between justice at the top and the defendant/litigant at the bottom there are three female figures who I interpret to be the three goddesses of fate. According to Greek mythology Zeus and Themis are the parents of the Fates - those who determine a person's life. One (Clotho - spinner) represents birth; another (Lachesis - apportioner) measures out the thread of life; and the third (Atopos - inflexible) cuts the thread, thereby signifying death.

Sixth, there is the multicoloured octopus type figure whose tentacles appear to be enveloping the "antihero". This I interpret as the representation of social forces that embrace us as we struggle through our experiences.

Seventh, and finally, there are several faces who appear to be caught between Justice at the top of the painting and the Fates and societal forces represented at the bottom of the painting: these might be judges who are caught between the ideal of justice and the messiness of social reality.

What, you might ask, does this have to do with impartiality, diversity and inclusion? The act of judging, within this situationalist conception, is an inescapably social act. Situationalism emphasizes that everyone who is involved in the legal process - both those who judge and those who are judged - are deeply affected by their experiential contexts. Specifically, it suggests that cultural forces are always crucial variables and that judging can only aspire to impartiality if it is sensitive to social phenomena such as racialization. And racialization affects us all. To my way of thinking we are all racialized, but we are racialized differently. Racialization is (among other things) a process of social encoding; it is a pattern of attributing presumptive attitudes, attributes or practices to certain people

because they are from a particular cultural background. Generally speaking, white people are racialized with relatively positive presumptions while people of colour are racialized with relatively negative presumptions.[26] Situationalism encourages us to remember that we are all racialized, but that racialization has a differential impact depending upon our cultural background.

Moreover, situationalism has quite a distinct conception of equality from that which underpins the classical model. Whereas the classical model favours sameness of treatment, situationalism (because of its keen awareness of the differential impacts of racialization) can contemplate the possibility of differential treatment being a mechanism of equality. In short, a situational approach to impartiality implies the need to be able to "discriminate sensitively".[27] As the Supreme Court suggested in *Turpin*, equality is to be interpreted so as to remedy or prevent "discrimination against groups suffering social, political and legal disadvantage in society".[28]

As these comments might still seem a little too abstract, let me try to be a little more specific by suggesting some questions that might emanate from a situationalist approach.

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[26] See more generally, Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995).

[27] Taylor, *supra* note 11 at 8.

[28] *R.* v. *Turpin* [1989] 1 S.C.R. 1296 at 1333.

But, again, to be clear these questions do not generate substantive right answers; rather they are more procedural.

The first question I might suggest is not "How am I to judge?" but rather "How am I to judge an/other?". The distinction is important, because the first formulation suggests an essentially static role whereas the latter reminds us that judging is a dynamic process that is an art as much as bureaucratic function. More importantly still, the latter formulation suggests that before we judge we attempt to make a good faith, if self-consciously modest, effort to come to terms with another's beliefs or conduct as *they understand them*. This quest for an "enlarged mentality"[29] does not mean that we have to accept that understanding as legally legitimate, but it does mean that we have to at least temporarily suspend and relativize our own understandings and avoid overhasty conclusions. It entails respect for other world views, not an abdication of autonomous judgement.[30]

The second question is to always ask: "Would I reach a different decision if the parties in question were white or people of colour?" I emphasize that this should happen in all cases, and not just in cases involving people of colour, for two reasons. First, by asking it in all cases it helps us to remember that white people are also racialized (usually in a privileged manner) and it encourages us to reflect whether we are actively privileging the white person because of some unarticulated assumptions, a privileging that would not occur if we were dealing with a person of colour. Second, to ask this question only in circumstances involving people of colour runs the danger of leaving unquestioned our

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[29] Nedelsky, *supra* note 22 (drawing on Arendt)

[30] *Ibid.*

traditional legal standards which might themselves be premised upon some culturally contingent assumptions that need rethinking. Avoiding such questioning may be forcing people of colour into compliance with certain notions that may be worthy of reconsideration and reform.

The third question might go as follows: "If I were the person appearing before the judge, do I think that sufficient reasons have been given to satisfy me that I have been treated in a fair manner, even if I have not won my point?" In my review of several recent cases involving allegations of apprehended judicial bias,[31] there have been some dicta from appeal courts suggesting that the less judges say the better, as they will then be less likely to open up themselves to allegations of an apprehension of bias. My own view is that this emerging trend is unfortunate and contradicts the ethical requirement of judicial openness and candour. Problems of diversity cannot be avoided by rendering them invisible. Rather, it is desirable to explicitly address them with integrity and candour. As Mr. Justice Freeman of the Nova Scotia Court of Appeal has recently stated:

> Questions with racial overtones make the difficulties [of assessing credibility (and judging more generally? R.F.D.)] more intense, yet these questions must be addressed freely and frankly and to the best of the judge's ability. Because of their explosive nature they are more likely than any others to subject the judge to controversy and allegations of bias, but they cannot be ignored if justice is to be done.[32]

To be clear, these three questions do not predetermine substantive conclusions. They certainly do not mean that people of colour are being subjected to less rigorous legal standards. Rather, they can be understood as regulative mechanisms through which we can monitor some of our own taken for granted assumptions. Moreover, a situationalist

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[31] Devlin, *supra* note 1.

[32] *R. v. R.D.S.* (1995), 145 N.S.R. (2d) 284 at 295.

approach is not a panacea. It does not mean that we will always be beyond reproach, but if we are mistaken then others can demonstrate to us our weaknesses and we can learn from our mistakes. In short, the development of a pluralistically sensitive conception of impartiality cannot come prepackaged: it can only be achieved by trial and error.

This ethic of openness, modesty and self-reflexivity conveniently leads me to my concluding points.

IV LOWERING OUR SIGHTS: MINIMIZING PARTIALITY

Above I suggested that while independence was obviously desirable, it should be understood as a means to the end of impartial and fair decisionmaking. Further, I have indicated that in my opinion this latter goal can probably be best pursued if we adopt a situationalist approach to impartiality. But even in this regard I want to urge caution. Impartiality and objectivity are ideals, and while ideals can be important motivations to action, they can also be distractions. One of the things that a situationalist approach highlights is that because of the messiness of our diverse contexts we are highly unlikely ever to get a full understanding of what is going on. This, in turn, suggests that true impartiality, objectivity or neutrality are unknowable and unattainable.[33] Thus, I wonder if it would not be more fruitful for us to change our focus: instead of forever seeking something that we cannot even know, never mind achieve, should we not deal with that of which we are sure - that we are inevitably partial? If we adopt this approach our task becomes

[33] It is on this point that the situationalist approach differs most markedly from the relationalist approach for the latter aspires to rework and reconstruct impartiality and is therefore "idealist".

somewhat different and more immediate: to try to minimize the risks of our being uninformed, biased or partial. This does not guarantee objectivity or neutrality, but it does provide us with a more specific set of possibilities that can generate immediate action.

It is in the spirit of this proposal that I would encourage members of the judiciary to pursue education programmes: to lower your sights from the false deities of impartiality and objectivity to the manageable chore of getting some useful information that will help to make more equitable decisions. As Mr Justice Iaccobucci recently stated: we need "education in a balanced mix of substantive law, skills training and social context education".[34] My sense is that the conference organizers have struggled hard to provide you with such a smorgasbord. These tentative comments might be conceptualized as an appetizer for the substantive offerings that are to follow.

[34] As quoted in Friedland, *supra*, note 6 at 167.